No. ____

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In The Supreme Court of the United States

LASTING BEAUTY, L.L.C. and DENISE HUMPHRIES,

Petitioners,

v.

CITY OF CHESAPEAKE and JAMES T. DAVIS, CZA, Zoning Administrator,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the courts below err in failing to determine that the subject City zoning scheme governing tattooing unconstitutionally burdens free speech and expression rights guaranteed by the United States Constitution?

2. Did the Courts below err in failing to determine that the subject City zoning scheme, facially and as applied, denies equal protection and due process rights guaranteed by the United States Constitution?

LIST OF PARTIES

The petitioners are Lasting Beauty, LLC and Denise Humphries, and the Respondents are City of Chesapeake, a municipal corporation, and James T. Davis, CZA, Zoning Administrator.

CORPORATE DISCLOSURE STATEMENT

Petitioner, Lasting Beauty, LLC is a Virginia company that has no parent corporation. No publicly-held company holds 10% or more of Petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

Lasting Beauty, LLC and Denise Humphries (hereinafter referred to collectively as "Humphries") respectfully petition this Court for a writ of certiorari to review the judgment of the Circuit Court of the City of Chesapeake (the "trial court"), and the decision of the Virginia Supreme Court denying review. The trial court held that tattooing is not sufficiently "communicative in nature to warrant protection under the First Amendment" and rejected Humphries' free speech, equal protection and due process arguments.

OPINIONS BELOW

The trial court issued a memorandum opinion on March 23, 2006 (reprinted in the appendix herein at App. 2-15), followed by a Judgment and Final Order entered May 3, 2006 (App. 17-19). The Virginia Supreme Court initially denied review by Order dated October 25, 2006 (App. 1), and then denied a Petition for Rehearing by Order dated January 19, 2007 (App. 16).

JURISDICTION

The Order of the Virginia Supreme Court refusing Humphries' Petition for Rehearing was entered on January 19, 2007 (App. 16). This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND CITY ZONING ORDINANCE INVOLVED

The First Amendment to the Constitution of the United States states as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Section One of the Fourteenth Amendment to the Constitution of the United States states as follows:

> § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chesapeake City Ordinance § 8-601(C)(27) states as follows:

> The following conditions shall apply to specific uses, as indicated in the "condition" column in the uses schedule:
>
> *****
>
> 27. Tattoo parlors shall be established and operated in accordance with applicable provisions in chapter 38 of the City Code. Additionally, in order to protect and preserve the character of residential neighborhoods,

residential property values, the vitality of commercial districts and the overall quality of life in Chesapeake, and further to prevent detrimental effects on educational facilities and public recreation areas, no tattoo parlor shall be located within 1,000 feet of any other tattoo parlor, private and public schools, day care facilities, public parks, religious institutions or any property zoned or used for residential purposes.

STATEMENT OF THE CASE

A. Overview

Humphries is a performer of "intradermal micropigmentation". Legally, this service is defined and treated exactly the same as traditional tattooing. Code of Virginia § 54.1-700[1]. This appeal involves the City of Chesapeake's zoning scheme relating to tattooing and restrictions imposed on the activity.

The subject zoning allows tattooing only in the City's "industrial" districts ("M-l" and "M-2"), and only as a "conditional use". Further, it bans any tattoo establishment "within 1000 feet of any other

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[1] Section 54.1-700 provides these relevant definitions: "'Tattoo parlor' means any place in which tattooing is offered or practiced. 'Tattooer' means any person who for renumeration practices tattooing. 'Tattooing' means the placing of designs, letters, scrolls, figures, symbols or any other marks upon or under the skin of any person with ink or any other substance, resulting in the permanent coloration of the skin, including permanent make-up or permanent jewelry, by the aid of needles or any other instrument designed to touch or puncture the skin."

tattoo parlor, private and public schools, day care facilities, public parks, religious institutions or any property zoned or used for residential purposes." See ordinance § 8-601. See also the color-coded map in the record as Plaintiffs Exhibit 5, depicting the limited allowable areas.

B. Prior tattoo litigation and the City's former ban

Legal battles over tattooing are nothing new to the City of Chesapeake, and one was the subject of a previous appeal to the Virginia Supreme Court. Specifically, in a June 5, 2001 ruling (memorialized in an order dated June 21), a judge of the Chesapeake Circuit Court struck down the City's then-existing blanket ban on tattooing. Days later, the City repealed the ban and enacted new ordinances regulating tattooing and severely limiting where it would be allowed. In the meantime, the City also appealed the trial court ruling invalidating the ban, but because of the repeal of the provision struck down by the trial court, the Virginia Supreme Court found that the appeal was rendered moot. City of Chesapeake v. Ancient Art Tattoo Studio, 02 Va. S. Ct. UNP 012082 (2002). Although the parties in that appeal briefed and argued many of the same issues presented here -- including free speech -- the dismissal ended that appeal without any opinion being issued.

C. The history of this case

This case proceeded before the trial court as a declaratory judgment action and a trial was held September 1, 2005. Thereafter, a March 23, 2006 memorandum opinion was issued by the trial court

ruling against Humphries. Humphries responded by appealing to the Virginia Supreme Court and followed all of the necessary appellate rules and procedures.[2] The writ of appeal was denied on October 25, 2006. Because of the critical issues in this particular appeal, and also because of ongoing tattoo law conflicts in Chesapeake and other neighboring cities, a Petition for Rehearing was presented for consideration by the Virginia Supreme Court. It was denied by Order dated January 19, 2007.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. Summary of Argument

This appeal presents to an opportunity for this Court to address and resolve an important conflict in constitutional jurisprudence. The specific issue is whether tattooists and their customers are protected by free speech, due process and equal protection principles, or whether localities are at liberty to engage in unrestrained regulation of and

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[2] In the Virginia Supreme Court, the Thomas Jefferson Center for the Protection of Free Expression, a free speech advocacy organization based in Charlottesville, Virginia, filed an "Amicus Curiae Memorandum of Support for Petitioners'/Appellants' Petition for Appeal" in which it agreed with Humphries that the trial court engaged in a flawed analysis and reached a clearly erroneous conclusion. This Court has accepted and reviewed several amicus briefs from this organization in recent years in cases involving important free speech issues. See e.g., Tory v. Cochran, 544 U.S. 734 (2005); Virginia v. Hicks, 539 U.S. 113 (2003); Nike, Inc. v. Kasky, 539 U.S. 654 (2003); Virginia v. Black, 538 U.S. 343 (2003); Erie v. Pap's A.M., 529 U.S. 277 (2000); United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).

discrimination against the art form. This Court has never addressed this particular issue, and the trial court concluded the latter. The result of the trial court's opinion is continuing harm to fundamental constitutional rights. This outcome burdens and damages not only Humphries and countless other tattooists and customers in Virginia and elsewhere, but also other citizens wishing to engage in forms of self-expression that local politicians may not favor. The trial court's opinion and the authority upon which it relied constitute dangerous precedent for localities to follow. Because there is a well-developed and thoroughly briefed lower court record, this case provides a good vehicle for issuing a defining and culturally significant opinion. To be sure, this is a legal battle that will rage on until this Court settles the debate.

As Humphries argued in the Virginia courts, tattooing is an ancient art form that has seen a resurgence in popularity in the United States in the past couple of decades. Like any other art form, it is entitled to First Amendment protection. Instead, however, its practitioners and those who wish to have the art form practiced upon their bodies have been subjected to a burdensome zoning scheme in the City of Chesapeake that cannot be justified. Not one witness who testified in the trial court could explain any need for the highly restrictive zoning involved in this case.

Facially, the subject zoning scheme discriminates against tattooing by imposing unjustifiably burdensome zoning requirements, while similar personal services are allowed as a matter of right in almost all areas of the City, and without the need for

a "conditional use permit". As applied, Humphries presented evidence of selective enforcement, to which the City had no answer or explanation.

B. Free Speech/Expression Issues

For purposes of this appeal and the City's zoning ordinance, intradermal micropigmentation and tattooing are indistinguishable; therefore, the Constitutional analysis is identical and Humphries has proper standing to challenge the subject ordinances on free speech and expression grounds. Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973). See also Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987).

There is currently a significant and long-standing split of authority in American jurisprudence regarding whether tattooing is an activity sufficiently imbued with communicative aspects to justify free speech and expression protection under the First Amendment to the Constitution. Logically, it is difficult to conceive of any reason why tattooing should be considered any differently from any other type of "art". Tattooing is an "art form" recognized both nationally and internationally. Lanphear v. Commonwealth of Massachusetts, Mass. Superior Court Slip Opinion 99-1896-B (October 20, 2000), aff'd by Commonwealth v. Lanphear, 50 Mass. App. Ct. 1107, 737 N.E.2d 1281 (2000); Virginia Board of Health Professions Report (January 3, 1994).[3] "Persons obtain tattoos to demonstrate commitment to other persons, to institutions, to religious beliefs, and to political and personal beliefs." Lanphear, p. 3. Many people -- men

[3] A copy of this report to the Virginia General Assembly is in the record as Exhibit B to Humphries' Bill of Particulars.

and women, middle-class professionals and otherwise -- seek tattoos "as an expression of individuality." Report, p. 12.

In Lanphear, the Superior Court of Massachusetts declared that a Massachusetts statute prohibiting tattooing by anyone other than a licensed physician was an unconstitutional infringement on the right to freedom of expression. See also Commonwealth v. Meuse, 1999 Mass. Super. Lexis 470, 10 Mass. L. Rep. 661 (Mass. Super. Ct. 1999) (dismissing criminal indictment of violation of tattoo statute because statute requiring tattooing by a qualified physician was unconstitutional).

In MacNeil v. Board of Appeal of Boston, 2004 Mass. Super. LEXIS 282, 18 Mass. L. Rep. 153 (Mass. Super. Ct. 2004), the court analyzed amendments to the Boston zoning code authorizing tattoo parlors pursuant to a conditional use permit scheme. In that case, the court rejected the notion that "merely speculative factual grounds" can justify regulations restricting free speech and expression rights, and refused to accept unsupported conclusions supposedly justifying the enactment. Id., 18 Mass. L. Rep. at 155 (internal citations omitted). The court went on to find that there was "insufficient evidence that the City and Zoning Commission's conditional use designation was designed to serve any substantial governmental interest and for that reason, the body art establishment ordinance...is unconstitutional." Id.

The trial court in this case rejected the free speech and expression arguments advanced by Humphries, and in comparing competing authority

submitted by the parties, appeared to rely primarily on State v. White, 348 S.C. 532, 560 S.E.2d 420 (2002).[4] The trial court also found support for its decision in Stephenson v. Davenport, 110 F.3d 1303, 1307, n. 4 (8th Cir. 1997), State ex. rel. Medical Licensing Bd. v. Brady, 492 N.E.2d 34 (Ind. Ct. App. 1986), Yurkew v. Sinclair, 495 F. Supp. 1248, 1254 (D. Minn. 1980), and People v. O'Sullivan, 96 Misc. 2d 52, 53 (N.Y. Misc. 1978). The analysis of the trial court and other courts which have denied free speech and expression protection for tattooing have made rulings that simply cannot be reconciled with this Court's jurisprudence, which has made it clear that many non-verbal, communicative and/or expressive activities are entitled to protection. See, e.g., Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L.E.2d 342 (1989) (the burning of an American flag is "speech" entitled to First Amendment protection); Spence v. Washington, 418 U.S. 405, 94 S. Ct. 2727, 41 L.Ed.2d 842 (1974) (the display of an American flag to which a peace symbol had been sewn is afforded First Amendment protection); Smith v. Goguen, 415 U.S. 566, 94 S. Ct. 1242, 39 L.Ed.2d 605 (1974) (wearing a small American flag sewn to the seat of one's pants is protected expressive conduct); Tinker v. Des Moines School District, 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed.2d 731 (1969) (wearing a black armband by students to protest American

[4] This opinion from a sharply divided South Carolina Supreme Court has been the object of a great deal of criticism. See, e.g., Anthony Jude Picchione, Tat-too Bad for Municipalities: Unconstitutional Zoning of Body-Art Establishments, 84 B.U.L. Rev. 829 (June, 2004); Bobby G. Frederick, Tattoos and the First Amendment - Art Should Be Protected As Art: The South Carolina Supreme Court Upholds the State's Ban on Tattooing, 55 S.C. L. Rev. 231 (Fall, 2003).

involvement in Vietnam is "speech"); Brown v. Louisiana, 383 U.S. 131, 86 S. Ct. 719, 15 L.Ed.2d 637 (1966) (the act of conducting a sit-in by African American students at a segregated "whites only" library is protected "speech"); and Stromberg v. California, 283 U.S. 359, 51 S. Ct. 532, 75 L.Ed. 1117 (1931) (display of a red flag in support of communism is speech). See also, Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996) (invalidating, on free speech and equal protection grounds, a licensing requirement imposed on artists desiring to sell artwork in public spaces). There is no principled distinction to be made between the above-described expressive activities and the art of tattooing, and, in fact, the permanent nature of tattoos makes the chosen statement or expression potentially much more significant than, for example, the temporary wearing of an arm band or the quick destruction of a flag via a burning.

C. Equal Protection and Due Process

Facially, the zoning denies equal protection and due process rights because it singles out a particular form of expressive activity and subjects it to a burdensome zoning scheme, without any justification whatsoever. This is a continuing effort by the City to discriminate against a particular activity and clientele, and Gene Waters, a former member of the Chesapeake City Council, testified without objection or rebuttal to the blatant admissions of intentional discrimination he heard from fellow Council members as the zoning was created. (TR 48-57).[5]

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[5] The September 1, 2005 trial transcript is in the record.

As applied specifically to Humphries, the subject zoning has not only ensnared her in the City's effort to hinder the opening of "tattoo parlors", but she has also suffered selective prosecution. (TR 30-41).

As this Court made crystal clear in a per curiam opinion, the equal protection clause of the United States Constitution recognizes a so-called "class of one" claim where a plaintiff alleges that "she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (internal citations omitted). This is exactly what the trial court record in this case reveals, and it is exactly what Humphries argued to the trial court at the conclusion of the evidence. (TR 170-71).

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Village of Willowbrook, 528 U.S. at 564 (internal citations omitted).

Although there is some precedent in Virginia law for invalidating zoning classifications and decisions on equal protection and due process grounds (see, e.g., Board of Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959)), there has been little guidance from this Court regarding the extent to which such constitutional principles apply to such and how lower courts ought to judge them. In fact, Justice Breyer's concurrence in Village of Willowbrook, Id. at 565, was

careful to "minimize any concern about transferring run-of-the-mill zoning cases into cases of constitutional right." See also Schad v. Mount Ephraim, 452 U.S. 61, n. 4 (1981) (declining to address similar due process and equal protection arguments and, instead, sustaining appellant's First Amendment challenge to a zoning scheme). Humphries urges this Court to take this opportunity to clarify the due process and equal protection analysis to be employed in zoning disputes, and respectfully submits that the City's irrational campaign against the art of tattooing makes this zoning battle anything but "run-of-the-mill." Simply stated, there must be a constitutional solution to the type of governmental oppression and admitted discrimination involved here.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted
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and DENISE HUMPHRIES

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